A **WOOLLEY DEVELOPMENT SDN BHD**

v.

MIKIEN SDN BHD

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZALEHA ZAHARI JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: W-02-10-2007]
C 30 OCTOBER 2007

CIVIL PROCEDURE: *Summary judgment - Contract - Sale and purchase of land - Rescission and refund of purchase price - Appeal - Whether there were bona fide triable issues - Privity of contract -* D *Novation agreement - Rules of the High Court 1980, O. 81*

CONTRACT: *Sale and purchase of land - Rescission - Summary judgment - Whether there were bona fide triable issues - Privity of contract - Novation agreement - Rules of the High Court 1980, O. 81*

E ***LAND LAW:*** *Sale of land - Rescission - Summary judgment - Whether there were bona fide triable issues - Privity of contract - Novation agreement - Rules of the High Court 1980, O. 81*

The plaintiff entered into 12 sale and purchase agreements with F the 1st defendant ('SPA'), purchasing various commercial properties in a project developed by the 1st defendant on its lands for a total purchase price of RM2,316,580. The purchase price was paid in full to the 1st defendant. The plaintiff subsequently entered several private caveats against the lands pending completion of the G SPA. The 1st defendant later abandoned the project, thus breaching the express term in the SPA to deliver vacant possession within 36 months from the date of the SPA. The plaintiff sought damages or, alternatively, prayed for a rescission of the SPA and a return of the total purchase price with interest. H The 1st and 2nd defendant, upon reaching an understanding by which agreement the 2nd defendant was to rehabilitate and complete the development project, entered into a Transfer Agreement. The plaintiff filed a summons in chambers seeking a summary judgment under O. 81 of the Rules of the High Court I 1980 ('RHC'). The 1st defendant did not oppose the plaintiff's application but the 2nd defendant, in its opposing affidavit, stated that there was a *bona fide* issue that militated against a summary

judgment being granted. The learned judicial commissioner ('JC'), however, granted an order of rescission of the SPA and directed the 2nd defendant, jointly or severally with the 1st defendant, to refund the total purchase price paid by the plaintiff together with interest. Hence, the present appeal by the 2nd defendant in which the same issue (as in the High Court) was raised, namely, that there was no contractual relationship and, as such, no privity of contract between the plaintiff and the 2nd defendant because: (i) the plaintiff's name did not appear as a purchaser in Annexure H of the Transfer Agreement ('Annexure H'); and (ii) there was no Novation Agreement entered into between the plaintiff, the 1st and 2nd defendants.

Held (dismissing the appeal)
Per Zaleha Zahari JCA (dissenting):

(1) On the facts, there were clearly issues to be tried in this case. The 2nd defendant's liability towards the purchasers of the properties from the original developer, to which the 2nd defendant was not a party of, could not totally be ignored, especially when read in the context of the plaintiff not being listed as one of the purchasers of the 1st defendant in Annexure H. The mere fact that a Transfer Agreement had been executed between the 1st and 2nd defendants did not *per se* make the 2nd defendant jointly and severally liable towards the plaintiff for breaches committed by the 1st defendant in the first instance. It must necessarily be read in the context of the terms agreed upon, as between the original developer, the rehabilitating developer as well as the particular purchaser concerned. The non-listing of the plaintiff in Annexure H, as well as the fact that there had been no novation of the agreement as envisaged by the Transfer Agreement, clearly had an impact on the issue of whether the 2nd defendant was liable towards an unfortunate purchaser caught in such a situation. Accordingly, this was not an appropriate case for summary judgment to be entered against the 2nd defendant. There were *bona fide* issues to be tried as far as the plaintiff's claim against the 2nd defendant was concerned. The learned JC had erred in making the orders which she did. (paras 27, 28 & 29)

Per Abdull Hamid Embong JCA delivering the majority judgment of the court:

(1) The learned JC had correctly approached this application by minutely considering and evaluating all the relevant documents and facts in coming to her decision. She had also concluded that the statements of the 2nd defendant in its opposing affidavit were inconsistent with contemporaneous documents. She had properly exercised her discretion in allowing the plaintiff's action, and that finding should not be upset. The 2nd defendant had never disputed that they were the successors in title and the permitted assignees of the 1st defendant. Thus, by virtue of cls. 41 and 38, the SPA was binding upon the 2nd defendant. Under the Transfer Agreement, the 2nd defendant had unequivocally accepted and was obliged to "rehabilitate, continue to carry out the development, construction and completion of the Project". It did not matter if the plaintiff's name was listed in Annexure H or not. The breach for which the plaintiff was seeking its remedy was for the failure of the 2nd defendant to complete this project and for the non-delivery of the commercial units to the plaintiff, the purchase price of which had been fully paid. Hence, to say that there was no privity of contract between the plaintiff and the 2nd defendant was untenable. It was not a *bona fide* issue worthy of trial. (paras 49, 50 & 51)

(2) With regard to the non-execution of the Novation Agreement, this was an issue of fact and not of law. It was thus incumbent upon the 2nd defendant to show that the other purchasers had entered into such an agreement. The 2nd defendant had not adverted to this fact in its affidavit in opposition. Furthermore, under the Transfer Agreement, it was the 2nd defendant who was obliged to prepare this Novation Agreement within 30 days of signing the Transfer Agreement with the 1st defendant. This was never done. Also, since this was a fact not asserted or argued before the High Court, it should not now be raised in appeal. However, having heard submissions on this point, it was found that it came to nothing. Further, the 2nd defendant had duly acknowledged and confirmed that pursuant to a private title search on 3 August 2000, it was aware of the numerous private caveats lodged, including the plaintiff's. The effect of the plaintiff's private caveat under the National Land Code was to give

notice to the whole world that it had a claim or an interest in the land. The 2nd defendant could not plead ignorance of this fact. In fact, before the commencement of this action, the 2nd defendant had, on 18 February 2005, requested that the plaintiff remove its caveats. The plaintiff did not object to that request and had in turn asked the 2nd defendant to give an undertaking to, *inter alia*, issue to it separate strata titles and to deliver forthwith vacant possession of the purchased properties if they were ready for delivery. As such, this Novation Agreement issue was also non-triable. (paras 52, 53, 54 & 55)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif memeterai 12 perjanjian jual beli dengan defendan pertama ('SPA') bagi membeli beberapa hartanah komersial dalam projek yang dibangunkan oleh defendan pertama di atas tanahnya dengan harga keseluruhan RM2,316,580. Plaintif membayar belian dibayar sepenuhnya dan selepas itu mendaftarkan beberapa kaveat persendirian terhadap tanah-tanah sementara menunggu SPA disempurnakan. Defendan pertama kemudian telah memberhentikan projek, sekaligus melanggar terma expres SPA untuk menyerahkan milikan kosong dalam tempah 36 bulan dari tarikh SPA. Plaintiff menuntut gantirugi, atau secara alternatif memohon pembatalan SPA dan pengembalian seluruh harga belian dengan faedahnya sekali. Defendan-defendan pertama dan kedua, sewaktu mencapai persefahaman di mana defendan kedua akan membaikpulih dan menyiapkan projek pembangunan, telah memeterai satu Perjanjian Pemindahan di antara mereka. Apapun, plaintif telah memfail saman dalam kamar bagi mendapat penghakiman terus di bawah A. 81 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan pertama tidak membantah permohonan plaintif tetapi defendan kedua, dalam afidavit menentangnya, menyatakan bahawa terdapat isu *bona fide* yang menghalang penghakiman terus dari diberikan. Yang arif pesuruhjaya kehakiman ('PK') bagaimanapun mengeluarkan perintah membatalkan SPA sekaligus mengarahkan defendan kedua, secara bersesama dan berasingan dengan defendan pertama, untuk mengembalikan keseluruhan harga belian yang telah dibayar oleh plaintif beserta dengan faedah. Defendan kedua dengan itu telah memfailkan rayuan di sini, di mana isu yang sama (seperti di Mahkamah Tinggi) telah dibangkitkan, iaitu, bahawa tidak wujud hubungan kontraktual, dan dengan itu tidak wujud priviti kontrak, di antara plaintif dan defendan kedua kerana: (i) nama plaintif tidak tercatit sebagai seorang pembeli di dalam

A Annexure H Perjanjian Pemindahan ('Annexure H'); dan (ii) tiada Perjanjian Novasi dimeterai di antara plaintiff, defendan pertama dan defendan kedua.

Diputuskan (menolak rayuan)

B **Oleh Zaleha Zahari HMR (menentang):**

(1) Berdasarkan fakta, jelas terdapat isu-isu yang perlu dibicarakan dalam kes ini. Liabiliti defendan kedua terhadap pembeli-pembeli hartanah yang membeli dari pemaju terdahulu, kepada mana defendan kedua bukan merupakan pihak, tidak boleh C dilepas pandang begitu sahaja, terutama jika dilihat dari konteks plaintif yang tidak disenaraikan sebagai salah seorang pembeli defendan pertama di dalam Annexure H. Fakta semata-mata bahawa Perjanjian Pemindahan telah dimeterai di antara defendan pertama dan kedua tidak *per se* membuatkan D defendan kedua bertanggungan secara bersesama atau bersendirian kepada plaintif atas kemungkiran-kemungkiran yang asalnya dilakukan oleh defendan pertama. Ia harus dibaca di dalam konteks terma-terma yang dipersetujui, di antara pemaju asal, pemaju membaikpulih dan pembeli berkenaan. Ketidak- E penyenaraian plaintif di dalam Annexure H, serta fakta bahawa tidak wujud penovasian perjanjian seperti yang dihasratkan oleh Perjanjian Pemindahan, memberi impak jelas ke atas isu sama ada defendan kedua bertanggungan terhasdap pembeli malang yang terperangkap di dalam situasi sedemikian. Oleh itu, ini F bukanlah kes yang sesuai untuk penghakiman terus dimasukkan terhadap defendan kedua. Terdapat isu-isu *bona fide* yang perlu dibicarakan setakat yang berkaitan dengan tuntutan plaintif terhadap defendan kedua. Yang arif PK telah khilaf dalam membuat perintah-perintah yang dibuatnya. G

Oleh Abdull Hamid Embong HMR menyampaikan penghakiman majoriti mahkamah:

(1) Yang arif PK telah menangani permohonan ini dengan H betulnya dengan menimbang secara halus dan menilai kesemua fakta dan dokumen-dokumen relevan sebelum mencapai keputusannya. Beliau juga telah memutuskan bahawa kenyataan defendan kedua di dalam afivadit menentang adalah tidak konsisten dengan dokumen-dokumen kontemporari. Beliau I telah melaksanakan budibicaranya dengan betul apabila membenarkan tindakan plaintif, dan dapatannya itu tidak harus diganggu. Defendan kedua tidak pernah mempertikai bahawa

mereka adalah waris-waris kepada hakmilik dan assignees defendan pertama yang dibenarkan. Oleh itu, berdasarkan fasal-fasal 41 dan 38, SPA adalah mengikat defendan kedua. Di bawah Perjanjian Pemindahan, defendan kedua telah menerima tanpa syarat dan terikat untuk "membaikpulih, meneruskan pembangunan, pembinaan dan penyiapan projek". Adalah tidak penting sama ada nama plaintif tersenarai di dalam Annexure H ataupun tidak. Pemungkiran yang plaintif memohon remedi baginya adalah atas kegagalan defendan kedua untuk menyiapkan projek ini dan kerana kegagalan menyerahkan unit-unit komersial kepada plaintif, yang mana harga-harga beliannya sudahpun di bayar sepenuhnya. Oleh itu, untuk mengatakan tiada priviti kontrak di antara plaintif dan defendan kedua adalah tidak boleh dipertahankan. Ia bukan suatu isu *bona fide* yang layak dibicarakan.

(2) Berhubung ketidak-laksanaan Perjanjian Novasi, ini adalah suatu isu fakta bukannya isu undang-undang. Oleh itu, menjadi tanggungjawab defendan kedua untuk menunjukkan bahawa pembeli-pembeli lain telah memeterai perjanjian tersebut. Defendan kedua tidak membangkitkan fakta ini di dalam afidavit menentangnya. Selain itu, di bawah Perjanjian Pemindahan, defendan kedua adalah orang yang bertanggungjawab untuk menyediakan Perjanjian Novasi ini dalam tempoh 30 hari selepas menandatangani Perjanjian Pemindahan dengan defendan pertama. Ini tidak dilakukan. Juga, oleh kerana ini merupakan fakta yang tidak dibangkitkan atau dihujah di hadapan Mahkamah Tinggi, ia tidak seharusnya dibangkitkan di dalam rayuan. Bagaimanapun, setelah mendengar hujah-hujah berkaitan persoalan ini, adalah didapati bahawa ianya tidak memberi apa-apa kesan. Selanjutnya, defendan kedua telah mengakui dan mengesahkan bahawa ekoran satu carian persendirian yang dibuat pada 3 Ogos 2000, ia menyedari tentang kaveat-kaveat persendirian yang dimasukkan dengan banyaknya, termasuk oleh plaintif. Kesan kaveat persendirian plaintif di bawah Kanun Tanah Negara adalah bagi memberi notis kepada semua orang bahawa ia mempunyai tuntutan atau kepentingan terhadap tanah. Defendan kedua tidak boleh berkata ia tidak tahu menahu mengenai fakta ini. Malah, sebelum tindakan ini dimulakan, defendan kedua telah, pada 18 Februari 2005, meminta supaya plaintif mengeluarkan kaveat-kaveatnya. Plaintif tidak membantah permintaan tersebut dan telah meminta defendan kedua memberikan akujanji antara lain

untuk mengeluarkan hakmilik-hakmilik strata berasingan dan menyerahkan serta merta milikan kosong hartanah yang dibeli sebaik sahaja mereka bersedia untuk membuat penyerahan. Oleh itu, isu Perjanjian Novasi ini juga tidak perlu dibicarakan.

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Manharlal Bhaichand Gathani v. Perwira Habib Bank Malaysia Bhd [2002] 1 CLJ 449 CA ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***

United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors [1975] 1 LNS 187 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 81 r. 3

Rules of the Supreme Court 1957, O. 14

For the appellant - K Kirubakaran (Haripal Singh Grewal with him); M/s Kiru & Yong

For the respondent - Yee Teck Fah (Ong Gek Lin with him); M/s Yee Teck Fah & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-22-43-2006]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] This appeal is against the decision of the learned Judicial Commissioner High Court Kuala Lumpur entering summary judgment under O. 81 of the Rules of the High Court 1980 ("the Rules") on the application of the respondent (the plaintiff in the court below) against Cherating Development Sdn. Bhd. (the 1st defendant in the court below, who is not a party in this appeal),

and Woolley Development Sdn. Bhd. (the 2nd defendant in the court below), the appellants in this appeal. In this judgment, parties will be referred as cited in the court below.

[2] The dispute in this appeal is concerned with the rights and interest of a victim of an abandoned project as against firstly, the original developer from whom the properties had been purchased and to whom the purchase price had been paid, and secondly, as against a rehabilitating developer who has taken over the abandoned project from the original developer.

[3] The Judicial Commissioner had on the facts of this case found no difficulty in granting an order-in-terms of the alternative prayer applied for by the plaintiffs in encl. (7). She granted an order of rescission of 12 Sale and Purchase Agreements, all dated 28 August 1997, executed between the 1st defendant as vendor of the one part, and the plaintiffs, as purchaser on the other part ("the 12 Agreements"). In addition to the order of rescission, the 2nd defendant was directed, jointly or severally with the 1st defendant, to refund the total purchase price paid by the plaintiffs to the 1st defendant in respect of all of the 12 Agreements amounting to RM2,316,580 together with interest at 11% per annum from 28 August 1997 to the date of realization.

[4] The 2nd defendant appealed against the judgment recorded against them, which is the subject matter of this appeal. The 1st defendant did not. The 2nd defendant's appeal was heard by this court on 16 May 2007 and dismissed by a majority. With respect, I was unable to agree with the majority decision and am of the view that this appeal should be allowed with costs and the case be remitted back to the High Court for trial. My reasons are as follows.

[5] An application which is the subject matter under appeal can successfully be resisted by a defendant if it can be shown that there are *bona fide* issues to be tried. Each case necessarily turns on its own peculiar facts. The issue for determination is whether, on the facts of this case, the 2nd defendant had discharged the burden of establishing that there are *bona fide* issues to be tried, and accordingly, not an appropriate case for summary judgment to be entered against them.

[6] The background facts are as follows: The 1st defendant, a developer, is the registered and beneficial owner of lands held under Geran No. 15113, Lot No. 190, Geran No 4500 Lot No 198, Geran No 14423 Lot No. 374, Geran 4501 Lot 784, Geran No. 4502 Lot No 786, Geran No. 4503 Lot No. 788, all at Sek 2 Bandar Butterworth, Pajakan Negeri 1146 Lot No. 1, Geran No. 4508 Lot No 5, Geran No 13528 Lot No. 6, Geran No. 15167 Lot No. 564 Sek 3, Bandar Butterworth, Geran No. 13786 Lot No. 1961, Geran No. 45091 Lot No. 180, Geran No. 4511 Lot No. 674 all at Sek 3, Bandar Butterworth, Geran Mukim No. 754 Lot 117, Geran Mukim No. 770 Lot No. 134, Geran Mukim 757 Lot No. 120, Geran Mukim 755 Lot No. 118 all at Mukim 9, in the district of Seberang Perai Utara, State of Pulau Pinang ("the said lands").

[7] The 1st defendant took steps to develop the said lands into a commercial centre and shop office known as "Raja Uda Commercial Centre" ("the development project"). By the 12 Agreements executed, the plaintiffs agreed to purchase, and the 1st defendant agreed to sell, shop offices more particularly described in the respective Sale and Purchase Agreement ("the said properties"), free from all encumbrances upon delivery of vacant possession subject to the terms and conditions specified therein for a total purchase price of RM2,316,580.

[8] Clause 7 of each of the 12 Agreements states that time shall be of the essence. Clause 20 provides that vacant possession of the property purchased shall be handed over to the purchaser within 36 calendar months from the date of execution of the agreement. In the event of the 1st defendant failing to deliver vacant possession of the properties purchased within the stipulated period, the 1st defendant shall pay the plaintiffs liquidated damages to be calculated from day to day at the rate of 11% per annum of the total purchase price of the said properties.

[9] Two clauses of the 12 Agreements referred to in argument in this appeal (which provisions were relied upon by the Judicial Commissioner in arriving at the conclusions which she did) reads as follows. Clause 38(f) of the agreement provides that "vendor" includes its successors in title and permitted assigns …" and cl. 41(a) provides that the agreement "shall be binding upon the

successors in title and permitted assigns of the vendor and the heirs, personal representatives, successors in title and permitted assigns of the purchaser."

[10] The development project in which the plaintiffs purchased the said properties was abandoned by the 1st defendant sometime in 1998. In year 2000, the 1st defendant, the 1st defendant's financier, (ie, Malaysian Building Society Berhad ("MBSB")) and the 2nd defendant, reached an understanding by which agreement the 2nd defendant was to rehabilitate and complete the development project upon terms.

[11] On 20 September 2000 the 1st defendant and the 2nd defendant executed a Transfer Agreement ("the Transfer Agreement"). Recital H of the Transfer Agreement refers to letter dated 27 July 2000, that the 1st defendant was to transfer the said lands to the 2nd defendant, subject to existing charges created in favour of MBSB, without any money consideration. Clause 3.1 of the Transfer Agreement states that 'in consideration of the mutual agreements and undertakings herein set out, the Parties to this Agreement have granted the rights and accepted the obligations herein appearing'. By cl. 3.2, the parties agreed and declared that the basic purpose of entering into the agreement was to transfer the said lands to the 2nd defendant by the 1st defendant free from encumbrances in order for the 2nd defendant "to rehabilitate, continue to carry out the development construction and completion of the project ...".

[12] Recital L states that the 1st defendant "has by separate and individual Sale and Purchase Agreements made with individual purchasers, details of which are more particularly described in Annexure H to the Transfer Agreement". Recital K and cl. 4(e) vii of the Transfer Agreement envisaged the execution of a novation agreement, between the 1st defendant, the 2nd defendant and the 1st defendant's individual purchasers, such as the plaintiffs.

[13] The plaintiffs entered private caveats against the lands upon which the properties were to be erected on 24 November 2001 *vide* presentation No. 14396/2001 under the National Land Code 1965 ("the Code").

[14] According to letter dated 18 February 2005, the 2nd defendant intended to proceed with the subdivision of the said lands. To enable them to do so, it was necessary for the plaintiffs to remove the caveats lodged against the said lands. The correspondence exchanged between the 2nd defendant and the plaintiffs shows that the plaintiffs were only prepared to remove the caveats lodged upon terms, by obtaining certain undertakings on the part of the 2nd defendant, which the 2nd defendant failed to do.

[15] On 16 January 2006 the plaintiffs filed an action against the 1st and the 2nd defendant, by which action they sought for an order for specific performance of the 12 Agreements, liquidated damages at the rate of 11% of the total purchase price from 29 August 2000 until date of delivery of vacant possession. Alternatively, for rescission of the 12 Agreements, restitution of the total purchase price including interest at the rate of 11% on the total purchase price from 28 August 1997 to the date of realisation.

[16] Paragraphs 4 to 9 of the statement of claim filed relates to the 1st defendant, describes the contractual relationship between the 1st defendant and the plaintiffs, and the alleged breaches committed by the 1st defendant. In para. 16 the plaintiffs alleged that by reason of the 2nd defendant having taken over the rehabilitation of the development project from the 1st defendant pursuant to the Transfer Agreement, the 12 Agreements were binding on the 2nd defendant, inclusive of the obligation to deliver vacant possession of the properties purchased within 36 calendar months of execution of the 12 Agreements. It was then contended that the 2nd defendant was liable to pay the plaintiffs loss and damages in the same terms as that claimed against the 1st defendant. Further and in the alternative, the plaintiffs alleged that the 2nd defendant, having taken over the development project from the 1st defendant as developer, owed them a duty of care to ensure that their acts or omissions does not adversely affect any of their rights, title and interest in the said properties under the 12 Agreements.

[17] It was then alleged that, by reason of the plaintiffs having paid the total purchase price of the properties amounting to RM2,316,580 to the 1st defendant, (letter dated 17 October 1997 of the 1st defendant to the plaintiffs was to be accepted as proof that such payment had in fact been made), by reason of the 1st

defendant's refusal to inform the plaintiffs as to when vacant possession of the said properties purchased were to be delivered, as well by reason of the failure to deliver vacant possession of the said properties within 36 calendar months from execution of the agreements, they had suffered loss and damage entitling them to liquidated damages at the rate of 11% per annum of the total purchase price of RM2,316,580 from 29 August 1997 until the date of delivery of vacant possession.

[18] *Vide* encl. (7) filed on 24 April 2006, the plaintiffs sought to enter summary judgment under O. 81 of the Rules against both the 1st defendant and the 2nd defendant for specific performance of the 12 Agreements; alternatively, for the 12 Agreements to be rescinded. The plaintiffs elected, by their solicitor's written submissions, to seek for an order in terms of the alternative prayer for rescission, and not that for specific performance, and other consequential orders.

[19] The Judicial Commissioner relied on cl. 38(f) and 41(a) of each of the 12 Agreements, ie, the definition of "vendor" as including "successors in title and permitted assigns". She ruled that cl. 41(a) was binding on the 2nd defendant as the 1st defendant's "successors in title and permitted assigns". She was of the considered opinion that by reason of the lands in Annexure A to the Transfer Agreement being the same lands upon which the said properties were to be erected, and by reason of the plaintiffs having paid the full purchase price to the 1st defendant, the fact that the plaintiffs' name was not listed in Annexure H annexed to the Transfer Agreement was not a sufficient ground to displace the plaintiffs' claim.

[20] In his submission counsel for the 2nd defendant stressed the fact that the 2nd defendant was not a party to the 12 Agreements, which fact, according to him, had not been given due consideration by the Judicial Commissioner. There was, on the facts of this case, no contractual relationship between the plaintiffs and the 2nd defendant. On the facts of this case the purchase price was paid to the 1st defendant, not to the 2nd defendant. He submitted that the Judicial Commissioner had therefore erred in making the 2nd defendant jointly and severally liable to reimburse the sums paid by the plaintiff to the 1st defendant. He submitted that in this situation, whether the 2nd defendant was liable to reimburse the sums of which they were not a recipient of, constitutes an issue to be tried.

[21] The 2nd defendant's counsel further submitted that the Judicial Commissioner was in error in construing the terms of the Transfer Agreement. Annexure H of the Transfer Agreement must necessarily be read to mean that the 1st defendant had represented to the 2nd defendant that the purchasers of the development project were that as listed in Annexure H. Encik Kirubakaran pointed out that the plaintiffs was not listed as one of the 1st defendant's purchasers in Annexure H. By reason of this omission he submitted that the 2nd defendant had accordingly not been put to notice of the plaintiffs' alleged interest in the said lands. Further, the fact that a Novation Agreement had not been executed between the 1st defendant, the 2nd defendant, and the plaintiff (as the 1st defendant's purchasers), as envisaged by Recital K and cl. 4(e)vii of the Transfer Agreement, was a material factor which had not been given due consideration by the Judicial Commissioner. On the issue of liability of the 2nd defendant towards the plaintiffs by reason of the obligations under the 12 Agreements not having been novated, is also a triable issue.

[22] As for the definition clause, "vendor" "includes its successors in title and permitted assigns …" and cl. 41(a), he submitted that the 2nd defendant, in their capacity as a "rehabilitating developer", cannot be construed to come within the ambit of the definition of being the "successors in title and permitted assigns of the 1st defendant". This, was also a triable issue.

[23] As to the interest rate awarded by Judicial Commissioner of 11% per annum from 28 August 1997, Encik Kirubakaran stressed the fact that although courts have recognized that a successful litigant who had been kept out of monies lawfully due to them is entitled to be awarded interest, the interest rate awarded is only 8% per annum upon the judgment sum from date of the issuance of the writ, and the rate awarded of 11% in this case has never been ordered by the courts in the absence of an express provision to that effect in the agreement in issue.

[24] In reply, the plaintiff's counsel submitted that the Judicial Commissioner was right in holding that there was no issue to be tried, be it on facts as well as in the law, and in issuing the orders which she did. He submitted that the fact that the 2nd defendant had executed the Transfer Agreement which they did, makes the 2nd defendant, jointly and severally liable with the 1st defendant

for the breaches that had occurred, as the 2nd defendant came within the definition of "vendor" as the "successors in title and permitted assigns" of the 1st defendant.

[25] He argued that the contention that the 2nd defendant's obligation was only towards purchasers listed in Annexure H of the Transfer Agreement was untenable as the 2nd defendant, in their capacity as a rehabilitating developer, was required to rehabilitate and develop the whole development project, and not confined to the individual purchasers of the 1st defendant specified in Annexure H.

[26] Having paid to the 1st defendant the sums due under the 12 Agreements, and in view of the clear breach of the 1st defendant's obligations to complete and surrender possession of the properties purchased within the time frame of 36 months, entitled the plaintiffs to rescind the 12 Agreements, and be reimbursed the sums paid to the 1st defendant, which obligation lies not only upon the 1st defendant, but also by the 2nd defendant, jointly and severally, consequential upon the execution of the Transfer Agreement.

[27] I am of the view there are clearly issues to be tried in this case. Liability of the 2nd defendant towards the purchasers of properties from the original developer, to which the 2nd defendant was not a party of, cannot totally be ignored, especially when read in the context of the plaintiffs not being listed as one of the purchasers of the 1st defendant in Annexure H.

[28] I am of the view that the mere fact that a Transfer Agreement had been executed between the 1st defendant and the 2nd defendant does not *per se* makes the 2nd defendant jointly and severally liable towards the plaintiffs for breaches committed by the 1st defendant in the first instance. It must necessarily be read in context of terms agreed upon, as between the original developer, the rehabilitating developer, as well as the particular purchaser concerned. The non listing of plaintiffs in Annexure H, as well as the fact that there has been no novation of the agreement as envisaged by the Transfer Agreement, clearly has an impact on the issue of whether the 2nd defendant is liable toward an unfortunate purchaser caught in such situation.

[29] I accordingly find that this is not an appropriate case for summary judgment to be entered against the 2nd defendant. The 2nd defendant has convinced me there are *bona fide* issues to be tried as far as the plaintiff's claim against the 2nd defendant is concerned. It is my finding that the learned Judicial Commissioner had erred in making the orders which she did.

[30] For the reasons above mentioned, this appeal is allowed with costs. The decision of the Judicial Commissioner is set aside and this case be remitted back for trial. The deposit to the appellants.

Abdull Hamid Embong JCA:

[31] This is the majority judgment of this court. My learned brother Tengku Baharudin Shah Tengku Mahmud, JCA has agreed with this judgment in draft and consented that it be our judgment.

[32] In this judgment the parties shall be referred to as the plaintiff and 2nd defendant as they were in the court below. We had, in the majority, dismissed this appeal and affirmed the decision of the learned Judicial Commissioner in allowing for a summary judgment to be entered under O. 81 RHC 1980.

Facts

[33] The salient facts as agreed were as follows:

1. The plaintiff (respondent here) and the 1st defendant (not a party in this appeal) entered into 12 sales and purchase agreements (SPA) all dated 28 August 1997, purchasing various commercial properties in a project (the project) developed by the 1st defendant on its lands in Butterworth for a total purchase price of RM2,316,580.

2. The purchase price was paid in full to the 1st defendant, and was duly acknowledged by the 1st defendant.

3. Some of the pertinent clauses in the SPA are these:

   (a) time shall be the essence of the SPA (clause 7);

   (b) the 1st Defendant shall at its own cost and expense apply for subdivision of the building so as to obtain the issue of a separate strata title to the Properties under the Strata Titles Act 1985 (clause 10(a));

(c) upon the issuance of the separate title to the Properties and subject to the payment of all monies due under the SPA by the Plaintiff to the 1st Defendant and the observance of all terms and conditions provided in the SPA, the 1st Defendant shall execute valid and registrable transfer of the separate strata title of the Properties to the Plaintiff, its heir or nominee or lawful assign, as the case may be (clause 10(b));

(d) vacant possession of the Properties shall be handed over to the Plaintiff within 36 calendar months from the date of the SPA (clause 20 (a))

(e) if the 1st Defendant fails to hand over vacant possession of the Properties in time, the 1st Defendant shall pay to the Plaintiff liquidated damages to be calculated from day to day at the rate of 11% per annum of the total purchase price of the Properties (clause 20 (b));

(f) the "Vendor" includes its successors in title and permitted assign (clause 38 (f));

(g) the SPA shall be binding upon the successors in title and permitted assigns of the 1st Defendant and the heirs, personal representatives, successors in title and permitted assigns of the Plaintiff (clause 41).

4. Subsequent to the execution of the SPA the plaintiff entered several private caveats against the lands pending completion of the SPA.

5. The 1st defendant later abandoned the project, thus breaching the express term in the SPA to deliver vacant possession within 36 months from the date of the SPA.

[34] The plaintiff contended that it suffered loss and damages calculated as agreed at 11% of the total purchase price already paid from 29 August 2000. The plaintiff sought for damages or alternatively prayed for a rescission of the SPA and a return of the total purchase price of RM2,316,580 with interest at 11% from 28 August 1997 till date of full realization.

[35] On 20 September 2000 the 1st defendant and the 2nd defendant (the appellant here) entered into a Transfer Agreement wherein some of the relevant recitals are now listed:

3.1 CDSB (i.e 1st Defendant) is the registered proprietor to all those pieces of land more particularly referred to and described in Annexure A hereto (the land).

A 3.2 Pursuant to a private title search conducted on 3rd August 2000, there are numerous private caveats lodged by individuals, corporation and financial institution over the land to protect their respective interests. The particulars are described in Annexure C hereto.

B 3.3 CDSB is desirous of developing the land into a township consisting *inter alia* of commercial, residential, mega mall and budget hotel known as Raja Uda Commercial Centre (CDSB has partly developed the land into four (4) storey shop-office).

C 3.4 CDSB commenced development of the Project in 1996 and has abandoned the Project since 1998.

3.5 By a letter dated 27th July 2000 addressed to CDSB, MBSB (the financiers) has agreed with CDSB's proposal in D granting WDSB (i.e 2nd Defendant) the rehabilitation and completion of the Project … whereby CDSB will transfer the Land to WDSB subject to the existing charges created in favour of MBSB without any money consideration.

3.6 To achieve the Objective, the parties together with MBSB E further agreed to enter into *inter alia* the following Agreement immediately upon execution of this Agreement on terms mutually agreed upon.

3.7 CDSB has by separate and individual Sale and Purchase Agreements made with the individual Purchasers details of F which are more particularly described in Annexure H, agreed to sell and transfer their rights and title to and interest in the relevant Unit erected or to be erected on part of the Land (the Unit) to the individual Purchasers upon payment of the full purchase price and the terms and conditions G stipulated in the S&P.

[36] The summons in chambers filed by the plaintiff seeking for a summary judgment under O. 81 RHC 1980 was not opposed by the 1st defendant.

H **[37]** The 2nd defendant, in its opposing affidavit however stated the following points which its learned counsel before us adverted to as raising a *bona fide* issue to militate against granting a summary judgment. They are:

I 5.1 Saya dinasihatkan oleh peguamcara Defendan Kedua dan sesungguhnya percaya bahawa Plaintif tidak mempunyai sebarang kausa tindakan serta pertalian kontrak ("privity of contract") terhadap Defendan Kedua

5.2 Saya mengatakan bahawa adalah menjadi syarat dan terma Perjanjian tersebut Defendan Kedua akan menyempurnakan kerja-kerja pembinaan projek tersebut dan menyempurnakan obligasi kepada pembeli-pembeli dalam projek tersebut di mana senarai pembeli diberikan oleh Defendan Pertama yang dilampirkan perjanjian tersebut dalam annexure 'H'

5.3 Saya seterusnya mengatakan bahawa nama Plaintif tidak disenaraikan

5.4 Defendan Kedua hanya bertanggung-jawab terhadap pembeli-pembeli yang disenaraiakan sahaja dan bukan kepada pihak-pihak yang tidak disenaraikan tersebut.

[38] Before us, learned counsel for the 2nd defendant, raised the same issue namely that there was no contractual relationship, and as such no privity of contract, between the plaintiff and the 2nd defendant by reasons that firstly, the plaintiff's name did not appear as a purchaser in Annexure H and that secondly, there was no Novation Agreement entered into between the plaintiff, the 1st and 2nd defendants.

[39] The learned Judicial Commissioner having perused and considered all the relevant documents supporting the plaintiff's claim came to this conclusion:

> Save for the fact that the second defendant denies liability to the plaintiff under the Agreements for the reason that it is not privy thereto, it has not denied that it is the successor in title and permitted assigns of the first defendant.
>
> The second defendant had relied on Annexure H of the Transfer Agreement to disclaim liability to the plaintiff. Given the fact that the lands referred to in Annexure H of the said Transfer Agreement are the same lands averred to by the plaintiff as being the lands upon which the properties are to be erected and purchased by the plaintiff, and given the fact that the purchase by the plaintiff had not been denied and neither has the payment of the full purchase price, it is my view that Annexure H is not sufficient to displace the plaintiff's claim.

The Law

[40] In *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, the Supreme Court had succinctly formulated the principles to guide a judge in deciding whether or not to grant a summary judgment when it held in the following terms:

(1) In an application under O. 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

(2) Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

(3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand.

[41] The Supreme Court also accepted and applied the principle as enunciated by the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18 where Lord Diplock in his advice stated:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility

> to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.

[42] When an issue of fact is raised in an affidavit opposing an application for a summary judgment the trial judge thus is duty bound not to merely accept it superficially and in a cursory manner. He is not bound to accept any allegation uncritically. In exercising his judicial discretion the judge is obliged to critically examine any assertion of fact and to do so in a fine-toothcomb manner if need be to determine if it were a *bona fide* factual dispute worthy of determination at a full trial.

[43] We are also reminded that O. 81 RHC is a summary judgment procedure and not a summary trial procedure (see *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609).

[44] In *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182, it was held that a summary judgment procedure under O. 14 RHC 1980 is not intended to shut out a defendant and should only be exercised in clear cases. We also adhere to this principle in coming to our decision. It must be emphasised conversely, that a plaintiff should not be put through the long – drawn costly process of a full trial in an action against a defendant who is without a *bona fide* defence. This is the philosophy behind a summary judgment procedure.

Why We Dismissed This Appeal

[45] This application was made under O. 81 RHC 1980. Order 81 r. 3 RHC states that:

> Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which **ought** to be tried or that there **ought** for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action. (emphasis added)

[46] The plaintiff in a summary judgment application first needs to establish a *prima facie* case that "he is entitled to judgment". The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 per Seah FJ). "Ought" in O. 81 r. 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.

[47] A judge in allowing for a summary judgment under O. 81 RHC 1980, does so in the exercise of his discretionary jurisdiction. He may enter a judgment for the plaintiff or allow leave to defend the action. If an appellate court finds that this discretion had been judicially exercised in the sense that he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed here. (see *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; *Eng Mee Yong & Ors v. Letchumanan, supra*).

[48] In *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30, the Federal Court in allowing for a summary judgment under O. 14 Rules of the Supreme Court 1957, had this to say:

> I must say in conclusion that an order made by a judge in the exercise of his discretion cannot be disturbed by this court unless it can be shown that in the exercise of such discretion he acted contrary to recognized principles. (See *Culver v. Beard*.) As Lord Denning M.R. said in *Hodges v. Harland & Wolff Ltd.* When a judge exercises a discretion and takes all the relevant considerations into account, it is well settled that the burden is on anyone coming to this court to show that he was wrong. I can see nothing wrong in the way in which the learned judge dealt with this case in ordering final judgment to be entered against the appellant. (per Gill CJ)

[49] In this appeal, we are of the view that the learned Judicial Commissioner had correctly approached this application by minutely considering and evaluating all the relevant documents and facts in coming to her decision. Her Ladyship had also concluded that the statements of the 2nd defendant in its opposing affidavit are inconsistent with contemporaneous documents. We find that she had properly exercised her discretion in allowing the plaintiff's action; and that finding should not be upset.

[50] It is noted, as submitted by learned counsel of the plaintiff, that the 2nd defendant had never disputed that they are the successors in title and the permitted assigns of the 1st defendant. Thus, by virtue of cls. 41 and 38 (f), the SPA is binding upon the 2nd defendant.

[51] Under the Transfer Agreement, the 2nd defendant has unequivocally accepted and is obliged to "rehabilitate, continue to carry out the development, construction and completion of the project." We think that it matters not if the plaintiff's name is or is not listed in Annexure H. The breach for which the plaintiff is now seeking its remedy is for the failure of the 2nd defendant to complete this project and for the non-delivery of the commercial units to the plaintiff, the purchase price of which had been fully paid. In our view to say that there is no privity of contract between the plaintiff and the 2nd defendant is untenable. It is not a *bona fide* issue worthy of trial.

[52] As regards to non execution of the Novation Agreement point, we agree with the plaintiff's stand that this is an issue of fact and not law. It is thus incumbent upon the 2nd defendant to show that the other purchasers had entered into such an agreement. The 2nd defendant had not adverted to this fact in its affidavit in opposition. Furthermore under the Transfer Agreement, it is the 2nd defendant who is obliged to prepare this Novation Agreement within 30 days of signing the Transfer Agreement with the 1st defendant. This was never done. We would also rule that since this is a fact not asserted or argued before the High Court it should not now be raised in appeal (see *Manharlal Bhaichand Gathani v. Perwira Habib Bank Malaysia Bhd* [2002] 1 CLJ 449). However having heard submission on this point we found that it came to nothing.

[53] Further, the 2nd defendant had duly acknowledged and confirmed that pursuant to a private title search on 3 August 2000 it was aware of the numerous private caveats lodged, including the plaintiff's. The effect of the plaintiff's private caveat under our National Land Code is to give notice to the whole world that is had a claim or an interest in the land. (see *United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors* [1975] 1 LNS 187). The 2nd defendant cannot now plead ignorance of this fact.

[54] In fact, before the commencement of this action the 2nd defendant had on 18 February 2005 requested the plaintiff to remove its caveats. The plaintiff did not object to that request and had in turn asked the 2nd defendant to give an undertaking to, *inter alia*, issue to it separate strata titles and to deliver forthwith vacant possession of the purchased properties if they are ready for delivery.

[55] In our considered view this Novation Agreement issue is also non triable.

[56] For these reasons, this appeal is dismissed with cost, and the order made by the High Court for a summary judgment in the alternative prayer is confirmed.